STATE OF MICHIGAN

COURT OF APPEALS

CURTIS TOWNE and JOYCE TOWNE,

Plaintiffs-Appellees,

v

GREGORY HOOVER and MIDWEST FIBERGLASS POOL DISTRIBUTORS, INC.,

Defendants/Third-Party Plaintiffs-Appellants,

and

JAMES HALLER and LONE PINE ENVIRONMENTAL, INC.,

Third-Party Defendants.

UNPUBLISHED
April 8, 2003

No. 231006
Oakland Circuit Court
LC No. 99-013718-CK

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Following a jury trial, plaintiffs were awarded $45,000 in compensatory damages and $15,000 in exemplary damages on their claims for breach of contract and fraud and misrepresentation in connection with the purchase and installation of an in-ground swimming pool. Defendants appeal as of right. We affirm.

I. Motion for Directed Verdict

Defendants argue that the trial court erred in denying their motion for a directed verdict regarding plaintiffs' fraud and misrepresentation claim and their breach of contract claim. This Court reviews de novo a trial court's decision to grant or deny a motion for a directed verdict. *Allen v Owens-Corning Fiberglass Corp*, 225 Mich App 397, 406; 571 NW2d 530 (1997). When reviewing a motion for a directed verdict, we must view the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted. *Id.*

A. Fraud and Misrepresentation

Defendants first argue that the trial court erred when it denied their motion for a directed verdict regarding plaintiffs' claim for fraud and misrepresentation. Defendants argue that plaintiffs failed to present evidence that defendants ever represented to them that the "Michigan" model swimming pool which plaintiffs ultimately received was manufactured by Blue Dolphin of Florida, the company that manufactured the pool plaintiffs originally contracted to purchase. We disagree.

The elements of traditional common-law fraud are as follows:

> As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Diponio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 51; 631 NW2d 59 (2001), quoting *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).]

Fraud need not be proven by direct evidence. *Detroit Trust Co v Hartwick*, 278 Mich 139, 152; 270 NW 249 (1936). Rather, it has long been the law in Michigan that fraud may be proven from inferences based on the facts and circumstances. *Id.*; *Connor v Harris*, 258 Mich 670, 677; 242 NW 804 (1932). Here, plaintiffs' fraud and misrepresentation claim was not predicated solely on verbal statements by defendants. Rather, plaintiffs relied on other conduct by defendants that led plaintiffs to believe that defendants were associated with Blue Dolphin pools and that plaintiffs had indeed purchased a Blue Dolphin pool, as they intended. Specifically, plaintiffs presented evidence that defendants used the business name of Blue Dolphin Pools of Michigan, that defendants' sales literature and other pertinent documents, including those which presented non-Blue Dolphin pools, contained the Blue Dolphin name and logo, and that defendants prepared documents fostering the belief that the "Grand Cayman" and "Michigan" model pools were manufactured by Blue Dolphin.

In addition, plaintiffs presented evidence that, before delivering plaintiffs' pool, defendants were involved in a lawsuit with another customer who likewise claimed to have been misled by defendants' sales literature and representations into believing he was receiving a Blue Dolphin pool when, in fact, he was not. Thus, plaintiffs showed that defendants had notice that their documents were misleading.

Upon reviewing the evidence in the light most favorable to plaintiffs, we find that the facts and circumstances and the inferences reasonably drawn therefrom were sufficient to establish fraud and misrepresentation. Accordingly, the trial court did not err in denying defendants' motion for a directed verdict regarding this claim.

B. Breach of Contract

Defendants also argue that the trial court erred in denying their motion for a directed verdict regarding plaintiffs' breach of contract claim. We disagree. The breach of contract claim

was based on defendants' failure to deliver a Blue Dolphin pool and failure to provide a valid warranty.

The evidence showed that plaintiffs originally contracted for a Blue Dolphin pool, specifically the "Atlantis" model. The original contract bore the Blue Dolphin logo at the top and listed the "Atlantis" model below. When plaintiffs had visited defendants' place of business to look at display pools, they had seen various models of Blue Dolphin pools, but did not see any indication that defendants sold any other brand of pools. When defendants later told Joyce Towne that plaintiffs could substitute the "Atlantis" model for an identical pool with an extra set of seats at no charge, she agreed to the substitution. The invoice substituting the "Grand Cayman" model for the "Atlantis" model also bore the Blue Dolphin logo at the top and listed the model type below. There is nothing in the invoice indicating that the "Grand Cayman" model was made by a different manufacturer than Blue Dolphin. When the "Grand Cayman" pool was delivered, plaintiffs decided that it was the wrong pool. Defendants told them that they could upgrade to the "Michigan" model for an extra charge. Plaintiffs agreed to this substitution. When plaintiffs had attended home shows in the past, defendant Gregory Hoover had given them a flyer about the "Michigan" model and two other models of pools. This flyer named defendants' business as "Blue Dolphin Fiberglass Pools of Michigan, Inc." and prominently displayed the Blue Dolphin name and logo. Although the literature also stated, "Presenting World Class Pools by Custom Fiberglass,"[1] the jury could have found that this phrase on the flyer did not sufficiently inform plaintiffs that the "Michigan" model was not manufactured by Blue Dolphin. After plaintiffs agreed to substitute the "Michigan" model for the "Grand Cayman" model pool, defendants presented plaintiffs an addendum to the contract. The addendum bore the Blue Dolphin logo at the top and listed the "Michigan" model type below without stating that the "Michigan" model was made by a different manufacturer. Viewing the evidence in the light most favorable to plaintiffs, a reasonable jury could conclude that defendants contracted to sell plaintiffs a Blue Dolphin pool and breached this contractual obligation by ultimately delivering to plaintiffs a pool made by a different manufacturer.

Additionally, plaintiffs claimed that defendant breached their obligation to provide a valid warranty. Defendants typically sent buyers a warranty after the customer made the final payment on a pool. However, defendants did not provide plaintiffs with a warranty until Joyce Towne went to defendants' place of business and demanded one. The warranty defendants provided to plaintiffs was with a different company called Custom One Piece Fiberglass Pools Company and was signed by a representative for that company on the same day Joyce Towne went in to get it. When plaintiffs tried to contact this company to repair their pool, the letter was returned to sender as undeliverable. Apparently, the Custom One Piece Fiberglass Pools Company had gone out of business. There was sufficient evidence for the jury to conclude that, when defendants gave Joyce Towne the warranty, they knew that Custom One Piece Fiberglass Pools Company was out of business. Therefore, viewed in a light most favorable to plaintiffs, there was sufficient evidence supporting plaintiffs' breach of warranty claim. The trial court did not err in denying defendants' motion for a directed verdict regarding plaintiffs' breach of contract and warranty claim.

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[1] The "Michigan" model pool was actually manufactured by Custom One Piece Fiberglass Pools Company.

II. Compensatory Damages

Next, defendants argue that the evidence did not support the jury's award of $45,000 in compensatory damages. Defendants assert that they presented evidence that plaintiffs' pool could be repaired for a cost between $3,000 and $4,000, and that plaintiffs failed to present any evidence that the pool could not be repaired. Accordingly, defendants contend that plaintiffs, having failed to sustain their burden of showing that the pool could not be repaired, were not entitled to damages representing the cost of replacement. We disagree. An award of damages must be supported by the evidence. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997).

Although Hoover testified that a company located in Florida could re-gel the entire swimming pool for a cost between $4,000 and $5,000, defendants never presented an estimate from that company, and Hoover demonstrated a lack of familiarity with or knowledge about work that company had done in Michigan. Furthermore, plaintiffs presented evidence that defendants had attempted to repair the pool several times without solving or correcting the gel-coat problems, and that defendants had ignored other requests to repair the pool. Additionally, there was evidence that defendants' own repair person told plaintiffs that this was the worst pool problem he had ever seen. In light of this evidence, the jury was free to conclude that attempts to repair the pool would have been futile. Regarding the award of $45,000 as compensatory damages for the cost of replacing plaintiffs' pool with another fiberglass pool, that amount was supported by plaintiffs' expert's testimony. Indeed, that amount was $2,000 less than his "best-case scenario" estimate of $47,000. Thus, the jury's award of compensatory damages was supported by the evidence.

III. Exemplary Damages

Defendants also challenge the jury's award of $15,000 in exemplary damages. In *Kewin v Massachusetts Mutual*, 409 Mich 401, 419; 295 NW2d 50 (1980), our Supreme Court stated:

> In Michigan, exemplary damages are recoverable as compensation to the plaintiff, not as punishment of the defendant. . . . [T]hose cases which permit recovery of exemplary damages as an element of damages involve tortious conduct on the part of the defendant. . . . An award of exemplary damages is considered proper if it compensates a plaintiff for the "humiliation, sense of outrage, and indignity" resulting from injuries "maliciously, wilfully and wantonly" inflicted by the defendant. . . . The theory of these cases is that the reprehensibility of the defendant's conduct both intensifies the injury and justifies the award of exemplary damages as compensation for the harm done the plaintiff's feelings.

Here, defendants argue that the award of exemplary damages was improper because the damages were awarded solely on the basis of the breach of contract claim. We agree that exemplary damages are not available for breach of contract. *Id*. at 419-420. However, the jury in the present case specifically found that defendants had defrauded plaintiffs and that plaintiffs were entitled to exemplary damages. Although the jury determined that plaintiffs did not sustain damages because of defendants' fraudulent conduct *over and above* their damages for breach of contract, this determination does not require the conclusion that plaintiffs did not sustain *any*

damages stemming from defendants' fraudulent conduct. It is apparent from our review of the record and the jury's verdict form that the jury intended to award exemplary damages due to defendants' fraud and misrepresentation.

Furthermore, we find no merit to defendants' argument that the award of exemplary damages was not supported by the evidence. There was ample evidence that defendants "willfully, maliciously, and wantonly" provided misleading documents and withheld material information, including the warranty, concerning the manufacturers of the "Grand Cayman" and "Michigan" models, intending that Joyce Towne would believe she had received a Blue Dolphin pool as she bargained for, in reckless disregard of her rights. There was testimony from both plaintiffs concerning the emotional outrage and indignity felt by Joyce Towne as she encountered the repeated problems with the pool, and then subsequently discovered not only that she had not been sold a Blue Dolphin pool, but that the pool she did receive carried no effective warranty because the manufacturer was no longer in business. The jury's award of exemplary damages was supported by the evidence. *Weiss, supra* at 637.

IV. Evidence of Prior Lawsuit

Next, defendants argue that the trial court abused its discretion when it permitted plaintiffs to question Hoover about his involvement in a prior lawsuit. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999).

The record indicates that Hoover opened the door to the disputed evidence when he claimed during cross-examination that he had never "been through this" before and denied that he had been involved in other lawsuits. *Hilgendorf v St John Hosp and Medical Center Corp*, 245 Mich App 670, 704 n 47; 630 NW2d 356 (2001). The trial court did not abuse its discretion in finding that the evidence that Hoover had been involved in a previous lawsuit was relevant to Hoover's credibility. Additionally, defendants were not unfairly prejudiced by this evidence, given the trial court's limiting instruction advising the jury of the limited purpose of the evidence.

The record does not support defendants' argument that Hoover was misunderstood, and that his statement that he had never been through this before meant only that he had never testified in court before, not that he had never been involved in a lawsuit. Defendants never offered this explanation in the trial court, despite ample opportunity to do so. Furthermore, when the jury returned and questioning continued, Hoover agreed that he had "tried to tell the jury" that this was "his first time in a lawsuit."

When Hoover denied that no one before plaintiffs ever mistakenly believed that they had received a Blue Dolphin pool when they actually received something else, this opened the door to the additional testimony about the prior lawsuit. That evidence was admissible not only to impeach Hoover's credibility, but also to show that Hoover knew that his literature, stationery, and conduct was misleading.

Plaintiffs' pre-trial agreement that they would not present this evidence to the jury without a prior discussion off the record was waived once Hoover suggested on cross-examination that he had never been involved in a lawsuit before, blatantly denied testifying in

other lawsuits, "challenged" plaintiffs' counsel to "pull out the other lawsuits," and agreed that he was trying to tell the jury that it was his first time in a lawsuit. The evidence was properly admitted to challenge Hoover's credibility and to prove his knowledge. The trial court did not abuse its discretion in admitting this testimony.

V. Evidence of Settlement Agreement

Defendants also argue that the trial court abused its discretion in admitting evidence concerning a lawsuit and subsequent settlement agreement between defendants and Blue Dolphin Pools of Florida. We disagree.

This evidence was relevant to plaintiffs' fraud and misrepresentation claim. The settlement agreement, dated April 14, 1997, reflected Hoover's agreement that he had "not been operating as a Blue Dolphin dealer . . . since on or about June 14, 1996." This evidence showed that when the "Grand Cayman" model was substituted for the "Atlantis" model in August 1996, and then the "Michigan" model was subsequently substituted for the "Grand Cayman" model, Hoover was no longer a Blue Dolphin dealer. Yet, the addenda to the contract, which provided for the changes to the "Grand Cayman" and "Michigan" models, still contained the Blue Dolphin logo and name, and did not indicate that these models were manufactured by a different company. Thus, the trial court did not abuse its discretion by allowing this evidence, which was relevant to the issues at trial.

VI. Testimony of Defendants' Offer to Compromise

Defendants also argue that the trial court erred by allowing the admission of evidence of defendants' offer to compromise. We disagree.

Before plaintiffs filed their lawsuit, plaintiffs' attorney had contacted defendants regarding their failure to make repairs to plaintiffs' pool. In response, Hoover wrote a letter to plaintiffs and their attorney stating that he would make the necessary repairs the following spring.

In a pre-trial motion, plaintiffs agreed that they would not enter the letter into evidence without first discussing it outside the presence of the jury. Although defendants contend that plaintiffs violated this agreement, the record indicates that, prior to questioning Hoover about this letter before the jury, the matter was discussed outside the presence of the jury and the trial court permitted it to be introduced into evidence.

Defendants also contend that the letter was an offer to compromise and, therefore, should not have been admitted pursuant to MRE 408.[2] We disagree. This letter, which was written

[2] MRE 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise

(continued…)

before the lawsuit was filed, did not contain a promise to furnish valuable consideration in order to compromise a disputed claim. Nor is there any indication in the letter that Hoover was attempting to dispose of any claim. Rather, the letter was merely an expression of willingness to honor the warranty on the pool. Therefore, the trial court did not abuse its discretion in determining that MRE 408 was not applicable.

Affirmed.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Brian K. Zahra

(…continued)

> negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

"Under MRE 408, evidence of an offer to compromise a claim is inadmissible to prove liability for or the invalidity of the claim, but the rule does not require the exclusion of evidence when offered for another purpose . . . ." *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).